In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-784

CARMINE J. PERSICO, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In 1968, following a fifth jury trial in the United States District Court for the Eastern District of New York, petitioner and three co-defendants were convicted of hijacking a truck in July 1959, and conspiring to do so, in violation of the Hobbs Act, 18 U.S.C. 1951. Petitioner was sentenced to concurrent prison terms of fourteen and nine years, respectively. The conviction was affirmed on direct appeal. *United States* v. *Persico,* 425 F. 2d 1375, certiorari denied, 400 U.S. 869 (Pet. App. D).[1]

[1] The indictment in this case was returned in April 1960. The first trial, in May 1961, ended in jury disagreement. Petitioner's conviction on both counts at the second trial, in June 1961, was reversed on appeal. *United States* v. *Persico,* 305 F.2d 534 (Pet.

In October 1970 petitioner moved, pursuant to Rule 33 Fed.R.Crim.P., for a new trial on the ground of newly discovered evidence. He alleged in this motion that certain of the trial testimony of Gaspar Vaccaro, the government's principal witness, had been perjurious. To demonstrate the alleged falsity of this testimony, petitioner produced an allegedly newly discovered witness who offered testimony which, in certain respects, conflicted with Vaccaro's trial testimony. Vaccaro's testimony at the hearing on the motion corroborated that of the witness. Neither the testimony of the witness nor that of Vaccaro, however, in any manner exculpated petitioner. The trial court denied the motion on several grounds, including its finding that the witness' testimony and Vaccaro's adoption of that testimony were not credible (Pet. App. E). The court of appeals affirmed, 454 F.2d 721 (Pet. App. F), and no further review was sought.

Thereafter, in January 1972, petitioner again moved for a new trial on the ground of newly discovered evidence, this time on the basis of a complete recantation by Vaccaro of his trial testimony incriminating petitioner. The motion was brought before a district

App. A). The third trial, in 1963, resulted in a mistrial when petitioner was shot and wounded. Petitioner's conviction following the fourth trial was reversed on appeal. *United States* v. *Persico*, 349 F.2d 6 (Pet. App. B). Petitioner and the other defendants were tried a fifth time in April and May of 1968. Thereafter, following a mandamus petition, the court of appeals ordered the trial court to enter judgments on the jury verdicts of guilty. *United States* v. *Dooling*, 406 F.2d 192, certiorari denied, 395 U.S. 911 (Pet. App. C).

judge other than the one who presided at trial.[2] At the suggestion of the government, the motion was submitted on Vaccaro's sworn deposition, affidavits, and other evidence. The district court ruled that a "thorough inquiry" could be had on the basis of the evidence presented, and that an evidentiary hearing was therefore unnecessary (Pet. App. G, 82a–87a). In a comprehensive opinion, the district court concluded that the full record, including grand jury testimony, testimony at five trials, and statements to government investigators, demonstrated that Vaccaro's recantation was wholly unworthy of belief. 339 F. Supp. 1077 (Pet. App. G). The court of appeals affirmed, relying on the opinion of the district court (Pet. App. H).

Petitioner contends that he should have been afforded an evidentiary hearing. This claim is answered in the thorough opinion below of the district court, on which we rely and which explains why on the unique facts of this case a hearing was not warranted.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1973.

[2] Judge Dooling, who had presided at petitioner's fifth trial and the previous motion for a new trial, recused himself after Vaccaro had appeared at his chambers and informed him that his trial testimony had been mistaken and that petitioner had not been involved in the hijacking. The trial judge apparently felt that he might be called as a witness at any subsequent proceeding.

[3] Moreover, we note that this case raises no issue of general importance. See Rule 19 of this Court's Rules.

U.S. GOVERNMENT PRINTING OFFICE: 1973